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Dialogue

RULES OF RECOGNITION IN THE PRIMARY COURTS OF ZIMBABWE: ON LAWYERS' REASONINGS AND CUSTOMARY LAW*

ROBERT B. SEIDMAN**

I. INTRODUCTION

In *The Concept of Law,*[1] H. L. A. Hart argues that a developed legal system has as a distinguishing mark a set of rules of recognition. These consist of rules of law that instruct lawyers and judges what counts as law and what does not. They include the rules of statutory construction and the use of precedent. Unless at least the members of the State apparatus accept the rules of recognition without coercion, the State must disintegrate.

These rules seem far removed from notions of power. In the usual perception, no set of rules seem more "technical", i.e. value-free. On the contrary, I argue here that in fact they embody choices, and that choosing one set of rules of recognition rather than another creates different power relationships.

In some cases ("clear cases") no disagreement exists about the existence and content of the applicable rule. In other cases ("trouble cases") reasonable lawyers disagree. In the positivist perception, one "true" law exists. When a judge decides a trouble case, his task becomes to find the true law, not to create law. In the realist perception, a trouble case reflects a genuine ambiguity or contradiction in the law. To the extent that a judge resolves a trouble case, he creates law.

Each of the perspectives understands the rules of recognition in a different way. For positivists, the rules of recognition should prescribe an agenda appropriate to finding the true law. For the realist, they should provide an agenda appropriate to intelligent law-creating.

The positivists make two charges against the realists. They say that when a judge creates law he steps out of his role and arrogates a power that his role denies him. They claim that, because law-creating depends on individual values, the realist perspective makes law unpredictable. Only if the judge limits his role to law-finding, they say, can a litigant confidently predict the result. In this paper I argue to the contrary: when a judge decides cases following a positivist perspective, he creates law without

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** Professor of Law and Political Science, Boston University, and former Visiting Professor of Law, University of Zimbabwe. For criticisms and suggestions, I am indebted to Doris Peterson Galen, Geoffrey Feltoe, Kempton Makamure, Sterwart Cant and Max Lambiris.

[1] H. L. A. Hart, *The Concept of Law* (1962).

revealing that he does so, or exposing his argument to criticism. By pretending that he does not create law, he maximises his power to create law. The positivist, not the realist perspective, merits the positivist critique of realism.

During the pre-independence period, positivism dominated Zimbabwe's courts that decided appeals in customary law cases. In that period white Native (later District) Commissioners and an all white (and all male) Appeals Court[2] decided customary law trouble cases. The Native Commissioners assumed that they knew "the native mind" and, therefore, the customary law. (A noted Rhodesian anthropologist, however, thought their knowledge superficial.)[3] The Court of Appeals for Native Civil Cases until 1969 did not contain a lawyer. Its judges too assumed they knew "the native mind". In deciding trouble cases, they determined the content of customary law, although in practice they lived far removed from African society. By using a positivist set of rules of recognition, these distant white judges maximised their power over the content of customary law.

After independence, the Customary Law and Primary Courts Act 1981 revolutionised the whole system of customary law courts. Implicit in the new Act lies a change in power relationships. Now, in a sense, a judge must share his power with the litigants. No longer ought a court create a law under the pretence of finding the law.

This article examines first the problem that trouble case rules of recognition purport to solve, and suggests a conceptual framework for the study. In the next two parts the paper examines explanations for trouble cases in general and customary law. In the fifth part, it examines in some detail the rules of recognition developed by the old Rhodesian customary law appeal courts. Finally, I propose a set of rules of recognition for customary law cases. I do not discuss here rules of internal conflicts.

II. THE DIFFICULTY: TROUBLE CASES IN CUSTOMARY LAW

In some customary law cases, the parties make contrary claims of law. In *Mativenga and Mamire v Chinamura,*[4] for example, the plaintiff's cattle wandered on the defendants' lands. To punish the cattle, the defendants' two nine-year old sons drove 13 head over a cliff. The plaintiff claimed damages from their fathers, asserting that Shona customary law held a father liable for the delicts of his child. The defendants asserted that Shona customary law held a father liable only for the delicts of his child committed whilst the child acts as a servant of the father. The court upheld the plaintiff's claim.

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2. The name varied from time to time: 1928-1964, The Native Appeal Court, Southern Rhodesia; 1965-1981, the Court of Appeal for African Civil Cases.
3. J.F. Holleman, "Disputes and Uncertainties in African Law and Jurisdiction: A Rhodesian Case Study" (1979) 17 *Af. L. Stud 1.*
4. *[1928-1962] SRN 829; [1937-1962] SRN 53 (1968).*

To understand the function of an appellate court in such a case, it seems helpful to draw an analogy between a lawsuit and a syllogism.[5] A syllogism states a relationship of subsumption:

Major premise:	All men are mortal (i.e. have the quality of mortality).
Minor premise:	Socrates is a man.
Conclusion:	Socrates is mortal.

One can analyse a lawsuit by analogy to the syllogist form. In that analogy, the rule of law constitutes the major premise, the facts in the case, the minor premise, and the judgement, the conclusion. One might analyse *Mativenga's* case, for example, thus:

Major premise:	A father should pay damages for the delicts of his child, whether or not the child acted as his father's servant.
Minor premise:	The defendant's children committed a delict by driving the plaintiff's cattle over a cliff.
Conclusion:	The defendants should pay damages to the plaintiff.

In most customary law as in most general law cases, the parties agree upon the major premise that the court ought to invoke. They differ about the facts (i.e. the minor premise), not the law. These we call "clear cases". Appellate cases, however, mainly deal with issues of law, that is to say, disputes about the major premise. In those cases — "trouble cases" — the parties assert contradictory major premises. For example, in *Mativenga's* case, these consisted of:

Plaintiff's major premise:	A father should pay damages for the delicts of his child, whether or not the child acted as his father's servant.
Defendant's major premise:	A father should pay for the delict of his child if, but only if, the child was then acting as his father's servant.

Given the facts (or minor premise) of that case, these two inconsistent alternative major premises lead to equally inconsistent, alternative judgments. One can analyse in the same way every trouble case — and every appellate case involving an issue of law constitutes a trouble case.

Where an issue of law falls for decision, the court must in effect choose between competing major premises. What rules of recognition should a court use in deciding a customary law trouble case?

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5. See R.B. Seidman, The Judicial Process Reconsidered in Light of the Role Theory" (1969) 32 *M.L.R.* 516.

The rules of recognition, of course, constitute rules of law. All sensible answers to the question — what rules of law ought a court to invoke in particular sorts of cases? — must rest upon an identification of the difficulty, and its causes, i.e. its explanation. Unless we discuss causes, the rules of law we propose are likely only to poultice symptoms.[6] I will begin by describing trouble cases in general law, the competing explanations for them, and the corresponding, competing rules of recognition that purport to solve them.

III. THE CAUSE AND CURE OF TROUBLE CASES IN GENERAL LAW

Zimbabwe's basic rule of recognition appears in the Constitution:

> Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June 1891, as modified by subsequent legislation having in Zimbabwe the force of law.[7]

General law consists of *written* law. The law of the Cape Colony appears in written case reports, statutes and subsidiary legislation; so does "subsequent legislation". Section 89 commands a court to discover the applicable general law by searching the books. That matches elementary notions of the rule of law: the law must pre-exist the transaction (for the books pre-exist the transaction), and it must be "cogniscible" (Bentham's invented word), meaning that a citizen can discover it before entering upon a transaction. Every trouble case casts doubts upon the central proposition that the general law matches these requirements of the rule of law. In a trouble case, by definition, a citizen could not discover in advance what law applied to a contemplated transaction — for if reasonable lawyers quarrel about the applicable law, how should a layman know what law applies? If only after the fact a court resolves the question of what law applies, does it not actually apply the law *ex post facto?*

To understand how courts have or should resolve an issue, one must first understand the causes of difficulty. Lawyers in effect put forward two alternative accounts for trouble cases in the general law. One, the positivist explanation, assumes a proposition of fact: The common law never changes. It always exists, implicit in the books, awaiting discovery by a truly learned court that correctly follows the rules of recognition. In *Central African Airways v Vickers-Armstrong*[8] the plaintiffs sought to attach the property of the defendants in order to found jurisdiction in an action for the loss of an aircraft that crashed, allegedly because of the defendants' faulty construction. Before 1931 in such a case Cape

6. See R.B. Seidman, *State, Law and Development* (1978), Chap. 3.
7. Constitution (Zimbabwe) 1980, s. 89.
8. [1956] R & N 4.

Colony law refused an attachment. A 1931 case,[9] however, upset the old rule and granted attachment. In 1956, which law ought the then Rhodesian court to follow? The rule of recognition then did not differ from today's section 89. If the court must follow the law of Cape Colony as it stood in 1891, it would deny the application for attachment. If it followed the law of the Cape Colony as it stood in 1956, it would grant the attachment. It adopted the latter course, but carefully asserted that the 1931 case did not change the law of the Cape Colony. "A practice," it said, "later shown to be erroneous, cannot be regarded as the law in force in 1891; the *true law* must be looked to."[10]

The positivist view holds that in a trouble case one major premise states the"true law". The other simply constitutes error. The true law exists in the books whatever vagueness or contradictions the books seem to reveal. Positive law exists; the court has the task of finding it.

That view resonates easily with Austinian jurisprudence. Austin maintained that law constitutes the command of the sovereign, a thundering challenge to the then prevailing natural law tenets. The jurist only needs to discover the true content of that command — i.e. the "true law". The "true law" constitutes a social fact; it exists. In deciding a trouble case, as in deciding a clear case, the judge never makes a normative choice. He never creates law. He finds it.

In that view, the rules for the use of precedent and the rules of statutory interpretation constitute guides in the search for "true law". The same set of rules of recognition serve in clear as in trouble cases. Properly used, they can lead to one and only one correct result. Whatever the result, the judge takes no moral or political responsibility for it. He has no policy, save to discover the sovereign's command — the true law.

An alternative explanation for trouble cases in general law, the realist view, asserts that they flow from the very nature of language and of law. Language has by its nature a core meaning and a penumbra. Suppose an ordinance stated: "Vehicles are forbidden in the park." That plainly forbids an automobile. A parks director who admitted Mercedes automobiles but not Austins would equally plainly violate the law. Would he violate the law if he permitted a person on a motor-driven wheel chair (also arguably a vehicle) to use the park? Given our common, acculturated understanding of the purpose of ordinance, an automobile falls within the core meaning of the word "vehicle". A motor-driven wheelchair, however, falls in the penumbra. Reasonable lawyers could easily argue over its inclusion in the word "vehicle". An analogous difficulty arises when the books contain two rules of law that contradict each other.
In the realist view, therefore, not error in finding the true law, but the very nature of language and law explains the existence of trouble cases. Trouble cases do not arise because somebody asserts an erroneous claim of law. They arise because the inherent nature of law and language make

9. *Halse v Warwick*, 1931 CPD 233.
10. *Ibid* p. 8; emphasis added.

inevitable cases in which reasonable lawyers could not agree about the applicability of a rule to a given set of facts.[11]

In the positivist view, if lawyers disagree about the major premise that controls a particular lawsuit, one has the right of the matter, and the other the wrong. In the realist perspective, one has the wiser side, the other the less wise. Because in a trouble case no such thing as "true law" exists in choosing between major premises, a judge to that extent makes law. He makes a normative choice — and every normative choice constitues a policy choice. He must decide what the law ought to be. For that, of course, the judge must take moral and political responsibility.

Like trouble cases themselves the realist view profoundly disturbs many lawyers bred in the positivist tradition. It seemingly violates the very notion of the rule of law. It tells us that, in cases falling in the penumbra of statutes or between two contradictory rules, nobody could know the law in advance. In those cases, the court decides the law that governs the case *ex post facto*. Those consequences, however, arise not because of the perversity of judges, but from the nature of law and language.

It seems bad enough that trouble cases coerce judges into the law-making enterprise. How can judges be prevented from going further, and creating law even when no real dispute about the law exists? To prevent that, a set of trouble case rules of recognition exists. These demonstrate that a proposed alternative major premise has a close enough connection with the written case law to permit a court to select it as the rule of law to control this and all similar cases. In the realist perspective, the rules of precedent and statutory interpretation have that office.

The difference between the positivist and the realist perspectives must appear, therefore, in the secondary rules concerning precedent and statutory interpretation. The positivist perspective requires clear-cut, coherent rules of recognition to make possible the discovery of "true law". The realist perspective requires contradictory rules, to make possible the development of permissible but contradictory alternative major premises. On that, the realist perspective has the advantage. Every law student quickly becomes cynical about the rules concerning the use of precedent and statutory construction. His lecturers solemnly tell him that *obiter dicta* have no binding force. Courts solemnly so repeat — when they want to get rid of an unwelcome precedent.[12] When they want to follow some chance statement in an earlier case, the cautions about the use of *obiter dicta* suddenly disappear. If it favours a position a later judge wants to take, a judge's over-the-shoulder quip suddenly becomes engraved in stone.[13] A court that today invokes the mischief rule of statutory interpretation[14] tomorrow follows the mischief rule's very opposite, the literal rule.[15]

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11. Seidman, *op. cit. supra n.5.*
12. See e.g. *R v Phillips Diary (Pty.) Ltd.*, 1955 (4) SA 120.
13. See e.g. *Fellner v Minister of the Interior*, 1954 (4) SA 523, 535.
14. *Commissioner of Taxes v Ferera*, 1976 (2) SA 653 (RAD) (*per* Macdonald JP).
15. *Hussey v Rhodesia Conscientious Objector Board*, 1977 RLR 92 (*per* Macdonald JP).

If one examines the rules of recognition in trouble cases, expecting to find there the clarity that the positivist perspective predicts, one begins to think of the law as silly putty. No wonder law schools produce cynics.

If, on the other hand, because of the very nature of language and law, fact situations must inevitably arise that generate trouble cases, then in some cases the rules of recognition must lead to contradictory results. Far from the rules of recognition defining an unreal positivist heaven, with a fixed, cogniscible and determinable law, ascertainable as a matter of fact, one can identify a trouble case precisely because in it the rules of recognition yield not one but two possible major premises. A judge may not adopt as a major premise a rule of substantive law that he cannot by the rules of precedent and statutory interpretation link up to the clear written law. If he can link up, not one, but more that one such major premise, he faces a trouble case. Then he must choose. Thus, the very contraries of the rules of precedent and statutory interpretation — i.e. the trouble case rules of recognition — warrants the realist perspective.

In the positivist perspective, the rules of recognition suffice for the judge to find the "true law". They seemingly require no policy choice by the judge. To make a policy while claiming not to do so insulates the policy-maker from accountability. In the realist perspective, on the contrary, the rules of recognition instruct the judge when he cannot avoid making a policy. He must choose between alternative permissible rules of law. If a trouble case arises because no "true law" exists, waiting to be discovered, then the judge who follows the realist perspective should make a policy decision by an agenda of steps appropriate to making a policy decision, not by pretending merely to find the true law. He must take moral and political responsibility for his choice. To that extent he becomes accountable. Accountability cabins power.

IV. POSITIVIST AND REALIST PERSPECTIVES OF CUSTOMARY LAW

Positivist and realist perspectives exist also in customary law. As with respect to general law, they yield different kinds of rules of recognition and power relationships.

Unlike general law, customary law does not exist in the books. The Customary Law and Primary Courts Act 1981 defines it as "the customary law of the indigenous people of Zimbabwe or any section or community thereof".[16] That law exists in their minds and behaviour. Section 5 of the Act provides that, if a court has a doubt about the existence or content of a rule of customary law, it may consider the submissions of a party, and his "evidence thereof", and also consult among other "lawful sources", published case reports, textbooks and opinions. Even the written sources of law among these, however, do not constitute "sources" of law in the customary law as a code of Shona customary law. A textbook can

16. s 2.

only serve as evidence of the law. Oral opinions about the law, too, can constitute no more than evidence of the law. What section 5 calls "sources of law" constitute no more that evidence of the law that animates the minds and motivates the behaviour of the people.

One can discover through evidence a "true" rule of customary law only if substantial consensus exists in the community about its existence and content. If that existed, one could find the true rule of customary law just as one can discover any other fact at issue in a lawsuit. If a case involved a dispute over the existence of a public right of way across private land, one might take evidence of whether people used the right of way without the owner's explicit permission for the necessary prescriptive period.[17] Analogously, some argue, by examining the evidence, one can find the "true" customary law.

Underpinning the positivist perception of general law lay a particular assumption about the nature of written law. Underpinning the positivist perception of customary law lay a particular assumption about the nature of society. Social science has long contained two contradictory models of society, the consensus and the conflict models. The consensus model assumes that practically everybody in society has the same basic values and attitudes. In the course of growing up, the right-minded citizen has his head stuffed with a whole set of norms and values that together make up his consciousness. Since we all live in the same society, we all undergo the same socialisation, and we all therefore adhere to the same sets of norms and values.

Given a consensus perspective of society, the positivist perspective of customary law necessarily follows. The content of the common consensus on the law constitutes an ascertainable fact. If the parties to a lawsuit assert contradictory major premises, only one of them can embody the common consensus at any time. As in general law, the judge's task becomes to find the law, not to make it.

A contrary explanation for customary law we call the realist perspective. That perspective rests upon the conflict model of society. Society, that model holds, may have a general consensus on some generalised notions — murder is a bad thing, or a father should receive damages for the seduction of an unmarried virgin daughter who becomes pregnant. Frequently, however, when one asks more particular questions, that consensus evaporates. Does it constitute murder to kill a wife caught in the act of adultery? Does it constitute seduction (with damages to the father)[18] or adultery (with damages to the husband) to have intercourse with a woman after betrothal but before solemnisation of the marriage?[19]

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17. An early Ghanaian case, *Welbeck v Brown* (1884) Sar FCL 185 (Gold Coast, 1882), later overruled, actually held that, to prove a rule of customary law in Ghana, one had to prove its existence since "time immemorial", defined (as in English common law) as since 1189 A.D.
18. See e.g. Child, *History and Extent of Recognition of Tribal Law in Rhodesia* (1965), p. 127.
19. *Ibid.* p. 131.

Other reasons help explain customary law trouble cases. While all rules have core meanings and penumbras, the language used may extend or reduce the penumbra. A statute making it an offence to travel at an "unreasonable" speed will have more penumbral cases than one that makes it illegal "to exceed 80 kilometres an hour". Customary law rules ineluctably have large penumbras. Because they do not appear in writing, disagreement always exists on the language in which to express them.

Customary law dispute settlement institutions, too, usually rely on compromise solutions, not the more or less inflexible application of a rule. A precise rule does not serve very well the cause of compromise. Customary law rules, therefore, had broad penumbras because of the rules' function in customary dispute settlement.[20] The conflict view of society and the nature of customary law rules and institutions explain the existence of customary law trouble cases.

As does its counterpart with respect to general law, the realist customary law perspective explains trouble cases not as the consequence of error, but built into the very stuff of the legal order. In general law, trouble cases arise from the nature of written law. In customary law, they arise not only from the nature of oral customary law, but also from the nature of ineluctable conflicts in the social matrix in which customary law exists.

In the positivist perspective, the rules of recognition for customary law consist primarily of the rules appropriate for the investigation of an issue of fact. If witnesses disagree, one must be right, the other wrong. Anthropological works become important as evidence of custom — indeed, some judges in the past have all but elevated some textbooks into a code of customary law. As with respect to general law, once an appellate court decides that a particular rule of customary law constitutes the true law, the case becomes a binding precedent.

The realist perspective takes a contrary view. It accepts that in many cases parties will agree on the rule. In that case, the facts fall within a core meaning about which no disagreement exists. It also assumes, however, that in genuine contested cases, the contest reflects a genuine division in society about the rule of customary law. As it does with respect to society itself, conflict, not consensus, holds sway in customary law. In determining what law to apply in a trouble case, a court does not "find" the true law. It must first find that two conflicting rules of customary law exist, and then make a policy choice between them. The rules of recognition far from identifying a single form of customary law, necessarily point to conflicting rules of law. The judge does not make a factual finding. He cannot avoid making a normative choice. He cannot avoid making law. Just as in general law, in a customary law trouble case a judge who follows the positivist perception wields power without accountability. If he follows

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20. T.W. Bennet and T. Vermeulen, "Codification of Customary Law" [1980] JAL 206, at pp. 212-223.

the realist model by explaining the true grounds of his policy choice, he submits his exercise of power to public scrutiny. To that extent he becomes accountable.

V. CUSTOMARY LAW TROUBLE CASE RULES OF RECOGNITON PRIOR TO 1981

The positivists ideology holds that there exists one true law. The realist ideology holds that, in a clear case, the parties cannot disagree about the law — that is, a consensus does exist in the society about the clear case rule ("thou shalt not commit murder"). To that extent, the realist and positivist perceptions agree. They disagree only about trouble cases.

Under Zimbabwe's *ancien regime,* customary law cases arose in Chief's courts and in Native (later District) Commissioners' courts. Because an appeal lay from the Chiefs'to the Commissioners' court, with a trial *de novo* the cutting edge came from the District Commissioners and the court to which appeals lay. Until 1972, that court consisted of the Chief Native Commissioner and two other senior Native Commissioners. After that, the Minister appointed a former High Court judge as presiding officer.[21] In the event, white Native Commissioners and white appellate judges decided the content of customary law. Moreover, they did that in the main without the parties having legal representation. When the appellate court decided a case, usually it did so without hearing adversary counsel, and without the benefit of their researches.

In deciding upon the issues of customary law that came before them, with few exceptions the judges adopted the positivist perspective. I argue that

(1) they followed a set of trouble case rules that arose principally to instruct alien judges in clear cases, thus reinforcing the positivist notion that one true law existed in the minds and behaviour of the population;
(2) the very nature of the rules of recognition demonstrated their inappropriateness for proving the existence of the "true" substantial rule; and
(3) the former appeals court for customary law cases manipulated the rules opportunistically to make policy decisions without disclosing the true grounds for decision.

A. *How the Rules Developed*

The customary law rules of recognition arose to solve a practical difficulty. The white colonial judges served as aliens in a strange country. They had not grown of age in the culture of which customary law made up a segment. In clear as is trouble cases, they had to inform themselves about the law. To do that, they found an analogy in the proof of foreign law. In a case involving foreign law, ordinarily an English court must inform itself about

21. General Laws Amendment Act 1973, s.4.

the foreign law. Typically, it does that through expert witnesses. So did the white colonial judges about customary law. Because it came to the court's attention through witnesses, it became fashionable to talk about proving customary law as a matter of fact. Customary law exists in the minds and behaviour of people. Its discovery seemed a process of discovering what was the case.

> In 1916, in *Angu v. Attah* (Gold Coast), the Privy Council stated: "As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof, become so notorious that the courts will take judicial notice of them."[22]

The very process by which a court informed itself about customary law reinforced the positivist perception that the court had the task of finding the true law, as though that constituted an inquiry into an issue of fact. Prior to 1969, Zimbabwe's courts and legislation adopted an analogous approach. Two statutes provided for courts that might hear cases affected by customary law. The Native Law and Courts Act 1937[23] provided that Chiefs might hear civil cases. Since the Chiefs presumably knew the customary law, the 1937 Act contained no explicit rules of recognition to instruct them to find it. The African Affairs Act,[24] which had its progenitors in a series of statutes going back to 1927 and before, provided that Native Commissioners (later called District Commissioners) would try civil cases between Africans. It provided no statutory guide to the ascertainment of customary law. Case law, however, developed a rule similar to *Angu v Attah.* In *Matambo v Matambo,*[25] a dispute arose over the distribution of a deceased's estate. The Appellate Division (now the Supreme Court) faced the issue whether the applicable customary law entitled somebody besides the eldest son of the decedent's senior wife to share in the estate.

The court stated:

> This seems to me to be a matter which requires the most careful investigation, an investigation which can only be conducted by hearing witnesses who are experts in this matter and who are in a position to give their views on what the Vakaranga custom is.[26]

The court evidently assumed that only one true version of Vakaranga custom existed. Just as courts in the positivist tradition everywhere, it perceived the judicial task as discovering the true law.

No system of law, however, can operate successfully if in every case

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22. *Angu v Attah* (1916) PC (1874-1928) 43 (unreported), cited in A.E.W. Park, *The Sources of Nigerian Law* (1963), p. 83.
23. No. 23 of 1937.
24. Cap. 228.
25. 1969 (3) SA 717 (RAD).
26. *Ibid.* p. 719.

the parties must prove what law animates the community. As a South African court stated in 1929: "If we were to insist on every usage and practice being proved by evidence, as we prove trade and other customs in our courts, it may render the application of native usage and practice unworkable, for then native cases might become too expensive and too protracted."[27]

If a court knows the law, and the parties do not challenge its statement of it, of course no need exists for the court to inform itself about it. The parties need to introduce evidence only when they disagree over the appropriate major premise that the court ought properly to apply in deciding the case. Only then must the court make a choice of law.

Like the Native Commissioners themselves, the then Rhodesian regime fondly believed that its Commissioners knew all about customary law. The 1969 Act, substantially repeated in 1981 with important procedural changes, therefore provided that it need consider what it called a "source" of law only in cases where "the court entertains any doubt as to the existence or content of a rule of customary law . . . "[28] It put into statutory form the central teaching of *Angu v Attah*.[29] Originally developed to instruct judges ignorant about customary law of its content, the system of "proving" customary law to judges ignorant of even "clear case" customary law became the basic rule of recognition not for clear cases but for trouble cases.

Section 5 in its 1969 version stated that, if the judge was in doubt as to the applicable rules — i.e. if the case at hand constituted a trouble case — the court should consider "such *submissions* thereon as may be made by or on behalf of the parties" (emphasis added). It might then

> . . . consult reported cases, textbooks and other sources, and may receive opinions either orally or in writing, to enable it to arrive at a decision in the matter.

B. *The Inconsistency between Zimbabwe's Customary Law Trouble Case Rules of Recognition and the Positivist Perception*

With regard to general law, I argue that the contradictory nature of the rules of precedent and statutory interpretation demonstrated that they could not serve to discover "true law". They only make sense of the realist perception.

In the positivist perception, one true law exists animating the minds and behaviour of society's members. If so, then it becomes subject to proof, just as one might prove the existence of a public right of way across private land. If only one true custom exists, the "sources" of law mentioned by the statute, however, constitute, plainly silly ways of proving it.

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27. *Nenbo v Nenbo*, 1929 AD 233, 236.
28. s. 5.
29. *Supra n. 22.*

The principal rule of recognition, embodied in section 5 of the 1969 Act, defined specific "sources" of law: reported cases, textbooks and opinions "orally or in writing". In the positivist view, these constituted not "sources" of law but evidence of a fact — that a particular rule of law animated the minds and motivated the behaviour of the people involved. They constituted, however, strange "evidence" of a fact at issue between the parties. Ordinarily, if A sues B, a proposition about a matter of fact that the judge finds in that litigation binds only A and B. Section 5, however, makes a rule of customary law announced in a case between A and B somehow a "source" of law in a case between C and D. If that constitutes binding *evidence* of the rule of law as a "fact", it does so uniquely in our jurisprudence. Again ordinarily, a witness cannot report hearsay — what an out-of-court declarant said in order to prove the truth of a proposition about a matter of fact contained in the out-of-court statement. Section 5, however, admits as a "source" of law textbooks, notoriously based on hearsay, sometimes many times confounded. By what magic does hearsay become especially reliable because somebody labels it a textbook? If one textbook disagrees with another, should a court analyse the true law — a matter for debate amongst social scientists? If two witnesses of equal credibility disagree about the existence or content of a rule of customary law, should a presiding officer try to determine what constitutes the true law on the footing that one witness had the greater credibility? The positivist perception holds that there exists in the minds and behaviour of the people one and only one "true" rule of customary law. If that were true, section 5 constituted a strange way of proving it.

If, on the other hand, the relist perception be true, that contradictory rules of customary law frequently exist in the minds and behaviour of different sections of the people, then section 5 made good sense. Section 5 in effect taught that of course one should expect that contradictory rules will often appear. It instructed the judge, however, that neither a party nor the court might invent a rule of customary law out of whole cloth. It embodied a sensible rule of recognition in customary law trouble cases: *a major premise becomes permissible if, but only if, it has a lawful source.* Section 5 stated some of the lawful sources: reported cases, textbooks, opinions. As in general law, it constituted a rule to identify a genuine trouble case, not a rule to decide it. Viewed from the positivist perspective, section 5 opposed everything lawyers know about evidence and proof. Viewed from the realist perspective, it stated a straightforward and reasonable rule.

C. *How the Old Courts of Appeal for Customary Law Manipulated the Rules of Recognition to Maximise Their Power*

Realists hold that, in a trouble case, to search for the true law constitutes a search for the chimera. Since, like the chimera, in such a case, no true law exists, like the supposed discovery of the chimera, the true law must exist only in the eye of the beholder. To follow the dictates of the rules of recognition for trouble cases as though they constituted rules of

recognition for a clear case (in which true law does exist) empowers the judge to create law under the guise of finding it. That maximises the non-accountable power of the judiciary over the content of customary law — a power enhanced by other provisions of the 1969 Act. I begin by discussing two of these additional provisions: the procedure prescribed by the Act, and the power to declare a rule void for repugnancy to justice and good conscience.

1. *Procedural Provisions*

The 1969 Act made minimal provisions for a party's participation in the decision about the law. The party could make "submissions" to the court about the law. The court had to advise a party about the authorities consulted. The court alone, however, decided whose opinions about the law to consult. It could receive the opinions of a particular Chief (or, frequently, the court messenger) in writing, without exposing the opinion to cross-examination. It could refuse to hear a witness offered by an opposing party. The court, not the parties, controlled the inputs to the process of deciding the existence and content of customary law.

2. *Repugnancy*

Until 1981, the court retained discretion to ignore a rule of customary law on the grounds that it seemed "repugnant to natural justice or morality". The Rhodesian courts never managed to give those words much content. In an often quoted statement, in 1922, Tredgold SRJ wrote:

> The only question is whether the custom . . . , is "repugnant to natural justice or morality" . . . whatever those words mean. I consider that they apply only to such customs as inherently impress us with abhorrence or are obviously immoral in their incidence.[30]

So vague a statement obviously endowed the courts with a powerful tool to nullify a rule of customary law that the white judges found distasteful.

In *Sitwala and Ndoza v Lizwe*[31] the Chief and other councilors at Bubi (an Ndebele area) approved a statement of Ndebele custom:

> According to Ndebele custom, when a pregnant girl reports her pregnancy to her lover and he denied responsibility, the matter is left until the child is born. Then the old people come together and the indicated lover is called and the child identified. If the child is stillborn there can be no truth arrived at in the identification. In a case such as this no action for damages would arise. If, however, the lover admitted responsibility an action for damages would arise.

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30. *Chiduku v Chidano*, 1922 SR 55; see also *Vela v Mosdinika and Magutsa*, 1936 ST 171, 174; *Chakan v Goro* [1928-1962] SRN 980 (1959).
31. [1928-1962] SRN 341 (1946).

Of that custom, the President of the Native Appeals Court stated that "we doubt the correctness of the native custom relied on by the defendant, and in any case we reject in on the grounds that to uphold it would manifestly be *contra bonos mores*".[32] Why the custom seemed "abhorrent" or "obviously immoral" does not appear.

3. The Use of Precedent

In general, the old appellate courts for customary law cases played ducks and drakes with precedent. Two examples may suffice. In *Nagareve v. Finhai and Dzingwai,*[33] a case from Umtali, the question arose of how much *lobolo* the parents of the divorced wife might retain on account of each child born of the marriage. Two witnesses testified that, amongst Africans in Umtali (a Shona area), no hard and fast rule existed concerning the amount of *lobolo* that a father might offset for each child. Two other witnesses, however, asserted that "it is generally accepted amongst natives of the Umtali district that two head of cattle or $20 is the normal 'value' in terms of *rovoro* (i.e. *lobolo*) of a child ", although the rule did not fix that amount rigidly. To resolve the differences between the witnesses, the court cited eight reported cases from Amandas, Chinhoyi, Mazowe, Harare, Shurugwi, Goromonzi, Marondera and Mutare itself — that is from all over Mashonaland. They ranged in time from 1935 to 1952, a period in which a marked change in the value of cattle had occured. These cases made varying decisions about the amount deductible on accout of a child. The single precedent from Mutare did deduct two head per child — exactly what one witness testified remained the rule. The court could as easily have stated that the Mutare case confirmed the witness who agreed with it. Instead, becuase of the conflict in these eight cases, the court decided that from the evidence (which went both ways) "and past decisions of the Native Appeals Court" no hard and fast rule existed. Under the guise of finding law, the court created it.

Again, in *Lesotom v Engasi*[34] a case of defamation arising in Harare, a metropolitan area, the court cited a case arising in Wedza (a Shona rural area) in 1938,[35]a case arising in Bulawayo (an Ndebele area) in 1950,[36] and a case from Goromonzi (a Shona area) in 1962.[37]

4. Textbooks

The 1969 Act, like the 1981 Act, specifies that a court may use textbooks as a "source" of customary law. In the early days the court tended to rely heavily upon Bullock, *The Mashona.* (The President of the Court and Chief Native Commissioner during the 1930s, Mr C. Bullock, the book's author, tended to cite it especially frequently.) More recently

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32. *Ibid.* p. 343.
33. [1928-1962] SRN 765 (1955).
34. *Lesotoni v Envasi,* 1966 AAC 36.
35. *Marufu v Ephraim* [1937-1962] SRN 40 (1938).
36. *Quegule v Nawu* [1937-1962] SRN 253 (1950).
37. *Antonio v Romos* [1962] SRN 1.

the court has cited Holleman, *Shona Customary Law* (1960), Child, *The History and Extent of Recognition of Tribal Law in Rhodesia* (2nd edn. 1965), Goldin and Gelfand, *African Law and Custom in Rhodesia* (1975), and Storry, *Customary Law in Practice* (1979).

The courts have sometimes treated these works as though enacted by a legislature as a code of law. In *Mativenga and Mamire v. Chinamura,*[38] the court decided that a father ought to respond in damages for the delicts of his son. It so decided entirely on the basis of statements made in Holleman's work. In *Mombeshora v Chirume,*[39] the court warned against so slavish a use of textbooks. It stated: "Dr Holleman's researches were conducted mainly in the Wedza district and did not include modern urban communities, where the idea of a father controlling the wealth of the entire family, as was the basis of the old customary law, is no longer as prevalent as it used to be."[40] Well might it so warn. In an earlier time, the court repeatedly referred to Whitfield's *South African Native Law* to prove a custom in Zimbabwe.[41]

5. *Witnesses*

The District Officers apparently learned about local custom in somewhat informal ways. In *Chingwenyiso v Chitema and Munyai,*[42] one stated with nice candour that "the question of reducing the *lobolo* on account of deceased children is debatable, but local opinion in the person of native messengers resident in Bushu Reserve and other natives resident in this Reserve, support the reduction. I consulted them before making my award." Occasionally, the expert witnesses consulted disagreed with each other. When they did, the court sometimes resolved the difference by reference to the reported cases. In *Kapisi v Magwayi* (a Makoni case),[43] the Native Commissioner heard oral evidence from two witnesses. They disagreed about the existence of a custom permitting the father of an unmarried girl to have custody on paying a "third beast" for maintenance. The court resolved the conflict by reliance on a 1929 case from Shamva. In the 1929 case the court had held that the father of the baby could receive custody only if the father of the mother agreed to accept the payment.[44] In that 1929 case, the court cited no authority for the rule, but merely stated, apparently on the basis of judicial notice, that "the payment of *mombe yo kurere* is not a right which can be demanded by the appellant. Under native custom it was subject to acceptance by the father or guardian of the woman seduced."[45] In the end, in *Kapisi's* case, despite the conflict in the evidence, the court chose one rather than the other rule because an ealier judge had simply asserted the "native custom".

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38. [1928-1962] SRN 829 (1958).
39. [1971] AAC 30.
40. *Ibid.* p.45.
41. See e.g. *Sitavi v Lonacala and Mhlahla*[1928-1962] SRN 28 (1931).
42. [1928-1962] SRN 65 (1935).
43. [1928-1962] SRN 90 (1937).
44. *Anderson v. Mariva* [1928-1962] SRN 19 (1929).
45. *Ibid.* p.20; see also *Nagareve's* case,*supra* n. 33.

I have found no case in which the court subjected a witness to rigorous cross-examination upon his testimony about the customary law. For example, in *Hlomani v Majayi and Mawengi,* [46] Hlomani, an insane person, killed one of his children and attempted to murder another child still in his wife's womb. The appeal court ordered that the Native Commissioner enquire about Shangaan customary law on the right of the father to custody of the surviving child after birth. A headman testified in part that under Shangaan law as it was "before the white man took over this country":

> If a man killed his child, or attempted to do so, he would have been killed. If he left any other children by the mother of the child he had killed, those children would be given to the mother and the mother's guardian. The relations of the husband who had killed his child would get nothing. The *lobolo* paid for the wife would be divided by the Chief, and the Chief would keep half and the remaining half would be left with the guardian of the mother of the child . . . Since the arrival of the white man we have changed as regards the *lobolo* but we do not give him the child. The child belongs to the mother . . . If the husband was provoked to be mad when he killed his child it makes no difference to any surviving child. It would still be given to the mothers's people . . .

Two other witnesses testified to the same effect. Nobody asked any of the witnesses whether they had ever actually observed a case of that sort, or how they had acquired their knowledge. It seems doubtful that many fathers had killed a child and then demanded custody of the remaining child. Without cases of that sort, how could the witness have known what they claimed to know?

6. Judicial Notice

Mostly, however, the courts simply announced customary law, apparently on a theory of judicial notice. That, combined with the respect the court had for its own precedent, meant that what some judges thought constituted the customary law frequently became the law for all time and all places. In *Soffa and Hilda v Gondwe,*[47] an action for defamation, the court relied upon a 1938 case[48] for the proposition that defamation constitutes an actionable wrong, but that no action will lie "if the words used were addressed to any person in authority in good faith and not with express malice; words spoken lightly or in heated quarrel and later withdrawn should not form the basis of an action, nor should common abuse".[49] The earlier case, however, did not even purport to represent the custom that actually obtained. There, the court stated:

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46. [1928-1962] SRN 43 (1933).
47. [1928-1962] SRN 331 (1946).
48. *Marufu v. Ephraim* [1928-1962] SRN 115 (1938).
49. [1928-1962] SRN 331, 333 (1946).

> This Appeal Court has no doubt that an action for slander does lie in the Native law of Southern Rhodesia. The plaint used is "He must whiten my name". In stating this the Court would wish to reconcile this *dictum* with circumstances now obtaining in Native life by stating that words spoken lightly or in a heated quarrel and later withdrawn should not form the basis of an action, nor should common abuse.

Again, it did not state what circumstances forced that amendment to the law. The court in the earlier case also relied upon Natal law, that defamation constituted an actionable wrong "provided that no action will lie if the words used were addressed to any person in authority in good faith, and not with express malice".[50]

7. Summary

In the past, the appellate courts supplemented the repugnancy clause by manipulating the rules of recognition to impose judicial control over the content of customary law. They controlled the persons whose opinions they would hear, and the texts they would consult, but principally they manipulated precedent, the use of textbooks, witnesses and judicial notice to create a law that could have resembled the law of the people only in its grosser outlines. They inevitably imposed their values upon the law, but in most cases without explicating them. In the following section we see how this warped the law in two areas: the right of damages for adultery by a wife of an unregistered marriage, and the burden and quantum of proof in adultery and seduction cases.

D. The Warping of Customary Law in Adultery and Seduction Cases

1. Adultery and the Unregistered Marriage

In Shona law, courts have always awarded a wronged husband damages for his wife's adultery. In Shona law, of course, that meant that a husband validly married by *Shona law* should receive damages from the adulterer. The Native Marriages Act 1950[51] provided that a marriage not registered with the Native Commissioner did not constitute a "valid" marriage. A husband by a marriage according to Shona law, but which he had failed to register, sued for damages for his wife's adultery.[52] The court denied the claim:

> The *Concise Oxford Dictionary* defines adultery as "voluntary sexual intercourse of a married person with one of opposite sex, married or not". It will therefore be seen that to constitute the offence of adultery the essential requirement is that one of the parties shall be married and this postulates the existence of a legitimate marriage.

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50. [1928-1962] SRN 115, 116, (1938).
51. No. 27 of 1950, later the African Marriages Act (Cap. 137) s. 3.
52. *Tarisayi v Tayongwa* [1954] SRN 61.

Since the plaintiff did not have a "valid" marriage, he could not recover for adultery. The *Concise Oxford Dictionary* hardly seems the best source of Shona customary law. The court obviously made a significant policy decision about the content of Shona law, not on the basis of criteria appropriate to the policy choice it made, but on criteria unrelated to it.

2. Burden of Proof in Seduction and Adultery Cases

In Shona customary law, it seems that the woman's confession of adultery naming the seducer (frequently when in labour), or her action in striking the adulterer or seducer with her under-apron, constituted strong, practically irrefutable evidence of who commited the seduction or the adultery. In a remarkable series of cases the appellate courts reversed this presumption, and then, years later, doubled back on their tracks. In 1938, the majority of the court apparently held that 'the circumstances disclosed did not constitute sufficient corroboration of the woman's confession".[53] In the same year the court stated:" . . . the Appeal Court considers it desirable to record its view that, in modern circumstances when many natives are sufficiently sophisticated to take advantage [of the custom that the woman's striking a man with her apron constitutes sufficient evidence of adultery], it cannot accept this action as an irrebutable presumption."[54] In 1940 , the court made the same assertion about a "labour pains accusation".[55] In the same year, the court went further and held that the custom of striking the adulterer with an under-apron "should in these days be accepted as corroboration with great reservations".[56] In 1942, the court rejected an adultery case for lack of proof, one judge stating that the record did not contain "proof of adultery beyond a reasonable doubt".[57] In that case the court knew well that it went beyond customary law. One judge stated: "In this case the accusation has not been proved beyond any doubt . . . I know that this attitude gives the Chiefs from whom appeals arise serious cause for thought. Their line is that a woman should not complain unles she had been seduced and it is difficult to convince them that this one-sided evidence cannot be accepted by us."[58] By 1946, the standard had become sufficient corroboration to "leave no room for doubt".[59]

By 1955, the burden of proof had become "the same as is required" in a criminal case[60] Thus did the court completely reverse the customary law on the subject, and all without one word discussing the policies behind the burden of proof in such cases. It reached that result by manipulation of the rules of recognition. It could do that because it treatd the customary law as "true" law. Searching for the true law, it could let its creativity run free. In 1972, the court called the new rule requiring corroboration

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53. *Nyamina v Samson* [1928-1962] SRN 96 (1938). The quotation appears in the headnote, not the text, but in this period the reporters did not request the entire judgement in every case.
54. *Makonsenkeyi v Paradzanvi* [1928-1962] SRN 117 (1938).
55. *Makavengavise v. Davidson* [1928-1962] SRN 163 (1940).
56. *Joshua v Fani* [1928-1962] SRN 180., 182 (1940).
57. *Ginger v Kamjgariwa* [1928-1972] SRN 277 (1942).
58. *Ibid.* p. 278.
59. *Idi v Mabala* [1928-1962]SRN 768 (1955).
60. *Madinga v Mudhliwo* [1928-1962] SRN 768 (1955).

"an alien importation [from South African civil law] which was of doubtful value even in its original system", and "a source of discontent to the people (in our system of customary law)".[61]

E. Summary

The all white, all male, courts that decided appeals in cases involving customary law inevitably determined the existence and content of the rules of customary law by which they decided the cases that came before them. In general (with the striking exception of Judge Pittman) they adopted a positivist perspective. Aided by the procedural rules that gave them complete power over the "sources" they would consult, and the repugnancy rule, the rules or recognition of customary law trouble cases, percieved as a search for "true" law, inevitably gave them inscrutable, unaccountable power to determine the content of customary law. In the colonial situation, the rules in effect gave the white District Commissioners and appellate judges power to decide the customary law. Thus did the rules of recognition play a part in creating a legal order in which a tiny minority of whites controlled the destinies of Zimbabwe's population.

VI. CUSTOMARY LAW TROUBLE CASE RULE OF RECOGNITION: 1981 AND AFTER

THE 1981 Act[62] made some modifications in the language of rules of recognition for customary law. I argue here that that language and the whole spirit of that Act require a transformation of the court's perspective from positivism to realism, from a system of a choice of law that maximised the autocratic, unaccountable and inscrutable power of the courts to one in which it shares power with the litigants. I will examine, first the changes wrought by the 1981 Act; second, the use of precedents, textbooks, witnesses and judicial notice under the new Act; and third, a suggestion for an appropriate agenda for deciding between alternative permissible claims of law.

A. The Changes Wrought by the 1981 Act

The 1981 Act made two significant changes that affect the chioce of law. First, it changed the appeal institutions. It abolished the court of appeal for customary law cases, providing an appeal route that went through a District Court (i.e. a magistrate warranted as a District Court) to the Supreme Court.[63] No longer will administrative officers — District Commissioners or former Native Commissioners — make up two thirds of the appeals court. From now on, appeals on issues of customary law will fall for decision before a court all of whose members have judicial independence. They will have their own biases, of course, but at least political and administrative necessity will not play a dominant role.

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61. *Masembura v Yawo* [1972] AAC 28.
62. Customary Law and Primary Courts Act 1981 (No. 6 of 1981).
63. s. 20.

Secondly, the new section 5 specifically permits the parties to submit evidence to the court. The old Act required the trial court to consider the "submissions" of a party. Now it requires it to consider as well the "evidence" he tenders.[64] The old Act empowered the court alone to determine the persons whose opinions it would "consult".[65] The new Act only gives it the power to determine the persons whose opinions are to be "relied upon".[66] In short, in the ealier Act the court had the power to decide a disputed issue of customary law without hearing more than the party's claim. Now it must also listen to its evidence. The old Act gave the court autocratic power. Now the court must to a degree share that power with the litigants.

B. The Fundamental Rule of Recognition

The 1981 Act embodied a clear legislative purpose generally to increase litigant participation in the decision-making process,[67] and specifically with respect to choice of law. What constitutes a sensible set of rules of recognition for customary law trouble cases that will achieve that purpose? As we have seen, the "sources" specified in section 5 war with positivist principles. Moreover, positivist principles maximise the judges' power over choice of law. Because the reasons for choosing one major premise over the other remains inscrutable, the litigants have no way of addressing the issues that the court in fact addresses. To meet the Act's power-sharing purposes, the rules must base themselves on the realist perception that, in a genuine trouble case, of course alternative permissible rules exist between which the court must choose. Based on that perception, the rules of recognition must provide a device for assuring the court that both alternative major premises in some sense reflect a tendency in society with respect to the "existence of content of a rule of customary law", and provide criteria for making the policy choice between them. Only so can the parties meaningfully provide inputs for judicial decision, and therefore, in a sense, participate in it.

In a trouble case, the several sources or law yield alternative major premises to control the lawsuit. Unless a party can point to an authorised "source" of law to evidence his claimed rule, a court cannot consider it. We may state these fundamental concepts as rules of recognition:

1. A court may assert as a rule of law to control a lawsuit only a rule evidenced by a lawful "source" of law.

1.1 If the various "sources" of law evidence only a single rule, the court shall adopt that rule to control the lawsuit.

1.2 If the various sources of law evidence more than one rule, the court shall choose one of them to control the lawsuit.

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64. s. 5.
65. s. 5 (a).
66. s. 5 (a).
67. *Supra*.

A source may evidence a rule with strong persuasive effect. On the other hand, the evidence may so far fail from persuading the court that it represents even a tendency in the area involved, that a court ought not to have the power to choose it over a contrary claim. Therefore

> 1.3 A court may assert as a rule of law to control a lawsuit only a rule that the sources of law evidence as likely to exist at least as a tendency in the customary law of the area concerned.

In the following section I discuss the various sources of law, and put forward rules of recognition relating to "permissibility". In the final section, I discuss the choice between competing major premises.

C. *The "Sources of Customary Law": The Rules that Identify a Claimed Rule as Permissible*

1. Decided Cases

In general law, published case reports embody the common law. A rule exists in the book, or it does not exist. By contrast, customary law does not exist in the books. It exists in the minds and behaviour of the people concerned. What weight ought a court to give a precedent of customary law? To answer that question we must first determine what a precedent case of that sort decides.

In so far as a judgement decides a trouble case, it chooses between two alternative permissible major premises. In a customary law case, to denote a major premise as "permissible" means that it exists as a tendency in the community — that is, that some proportion of the community have it in their minds and reflect it in their behaviour as a rule of customary law. Every customary law appellate case must embody a judicial finding that at the time and place that the case arose, at least some part of the community adhered to the rule announced in the decision. Unless it did, the earlier court could not have selected that rule as the major premise for the precedent. We suggest that a precedent case sufficiently evidences the rule of customary law for which it stands to make that rule "permissible". We can, therefore, state our second rule of recognition:

> 2. A court may select as a major premise a rule of customary law evidenced by a reported case.

A case, however, can only evidence a rule for the time and place in which the facts of that case arose. In general law, one can always distinguish a precedent on the ground that, after the earlier decision, the legislature enacted a new statute affecting the issue. In customary law, if serves to distinguish a precedent that it laid down a rule for another time or place. It will not do to cite a case arising in Mashonaland (and, therefore, presumably deciding an issue of Shona law) as a precedent to evidence the existence of a rule of Ndebele law. We can therefore, state two corollaries to rule 2:

2.1 The more remote in place, the more weakly a precedent evidences a rule of customary law.

2.2 The more remote in time, the more weakly a precedent evidences a rule of customary law.

Corollary 2.2. undercuts many of the older cases in the reports. It suggests that a court may at best warily assume that these still represent even a tendency in customary law today.

A precedent, however, does more than evidence that the rule it announces at one time and place existed at least as a tendency in society. In a trouble case, the court must choose between alternative permissible major premises. Presented with a choice between the *same* permissible major premises as the appellate court faced in the precedent, of course the appellate court's choice ought to have binding effect. A choice of that sort constitutes a policy decision by the appellate court. It would become intolerable to have every court making its own policy choices.

Therefore:

2.3 A precedent decision binds a lower court in so far as it faces a choice between the same alternative major premises as did the court in the precedent case.

2. Textbooks

As did the old statute, section 5 of the new Act specifies textbooks as a source of customary law. Therefore:

3. A court may select as a major premise a rule of customary law evidenced by a textbook.

The textbooks available in Zimbabwe as reference works on customary law have different standings as evidence of customary law. They fall into two groups. Some represent independent field work by trained anthropologists — Bourdillon, *The Shona,* and Holleman, *Shona Customary Law,* for example. Others, compiled by civil servants, only put together the cases of the former appellate courts for customary law cases — Child, *The History and Event of Recognition of Tribal Law in Rhodesia,* and Storry, *Customary Law in Practice,* for example. The latter, which do no more than rationalise the cases, only report custom as the appellate courts have declared it. Self-evidently, the latter can have no higher probative value than the cases upon which it rests. A court ought to rely on the cases, not on Child's or Storry's interpretation of the cases.

Therefore:

3.1 A textbook cannot have a higher evidentiary value that the data base on which it rests.[68]

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[68] See *supra* text accompanying n 39.

Several corollaries flow from that proposition:

3.1.1 The evidentiary weight of a textbook becomes less the more remote its data base in time.[69]

3.1.2 The evidentiary weight of a textbook becomes less the more remote its data base geographically.[70]

Finally, a court should examine a textbook as a textbook, not as a code of law. Codes of law embody the law. Because they do, every word has enormous significance. A whole tribe of lawyers serve as parliamentary draftsmen, devoted to the art of putting words into laws so that they will suffer as few ambiguities as human contrivance can manage. Scholars, on the other hand, have a different sort of meaning to convey to their readers. Courts should read a textbok sympathetically, trying to understand it as would a scholar, not a lawyer analysing a code.

3. Witnesses

Witnesses too constitute a source of law. The same rule applies to them as reported cases and textbooks:

4. A court may select as a major premise a rule of customary law evidenced by a witness's testimony.

The rule that applies to the weight that a court should accord a witness's testimony tracks the rules concerning the weight it should accord to a textbook or a reported case:

4.1 A witness's testimony about a rule of customary law can have no higher evedentiary value than the witness's opportunity and capacity to learn of the rule, his capacity to remember and to report it, and his veracity.

4. The Judge's Own Knowledge

In most cases, the presiding officer will have some knowledge about the applicable rule of law. Therefore:

5. A court may select as a major premise a rule of customary law which he of his own knowledge knows exists as a rule of customary law in at least a portion of the community.

Particularly because the judge holds that opinion, he must take care to warn himself about his sources of knowledge — his data base. Does it truly warrant a finding that the rule exists in at least a portion of the community?

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69. Bullock, *The Mashona*, has for this reason fallen into disuse.

70. See *supra* text accompanying n 39

That is:

> 5.1 A judge's own knowledge about a rule of customary law can have no higher evidentiary value than his own opportunity and capacity to learn of the rule, and to remember and report it.

A judge's own knowledge of a rule constitutes at best one possible source of the rule. That a witness testifies to any alternative possible rule, or that the cases or textbook mention another, proves not that either the judge or the alternative source must err, but that two alternative permissible rules exist. That they exist demostrates only that the judge has on his hands a trouble case. In a trouble case, a court must choose between alternative permissible major premises. That one of those alternative major premises has as its source the judge's own knowledge does not necessarily make that rule more or less authoritative, or better, than a rule derived from reported cases, textbooks or witnesses. The court cannot avoid the responsibility of choosing. In the final section of this article, I discuss briefly the criteria of choice.

D. The Criteria of Choice between Permissible Alternative Rules of Law

Rule 1 sets forth the basic rule of recognition for customary law cases. Rules 2-5 set forth the rules that make a claimed major premise "permissible". Rule 1.2 requires a court to choose between the alternative rules evidenced by the sources of law. By what criteria ought a court to choose?

The realist perspective holds that because conflicts exist within society, conflicts will ineluctably exist in many aspects of customary law. The rules proposed here reflect that ineluctable conflict. Rules 2,3,4, and 5 all state that a court *may* use as a major premise to control a lawsuit — that is, it may assert as a rule of customary law — only a rule evidenced by one of the four sources identified. Our theory tells us to expect that these sources may evidence contradictory potential rules, for our theory asserts that society embodies not consensus but conflict. It does violence to our theory to try to discover which of these contradictory rules most likely constitutes the "true" law. However positive a witness, however detailed a textbook, however fixed in his mind a judge's knowledge of the law, like the blind man examining the elephant, none of them err in reporting different rules of customary law. In his description of the elephant, a blind man only errs by insisting that the elephant is like a long snake, or the broad leaf of a flower, or a whiskbroom, or a tree trunk. The elephant constitutes all of these — trunk, ear, tail and legs. Each blind man tells the truth, but only part of the truth. By insisting that he alone accurately describes the elephant, each tells falsehood. So each source of customary law may correctly evidence a rule of customary law to which a portion

A court must therefore, make a choice between alternative permissible rules, not on the footing that one constitutes true law and the other false law, but on the footing that one constitutes better law than the other. The court cannot avoid making a policy choice. By what criteria ought it to make that choice?

Three different sorts of criteria suggests themselves: equity; the purity of customary law; and the public interest. We discuss each of these in turn.

1. Equity

A decision by a court creates a precedent. It lays down a rule that to a degree will affect future cases and future behaviour of members of the community. On the other hand, a case involves a dispute between two quite specific parties. A form of natural law school of jurisprudence asserts that a court should decide a case in accordance with its sense of what will do justice between the parties.[71]

That proposition conceals too much. Our notions of doing equity between the parties conceal norms prescribing behaviour and embodying value judgements: a court should favour widows and orphans over soulless corporations; the party with the deepest pocket should pay; or even that tiny, white-haired middle-class white ladies have a greater claim for equity than scruffy, young male blacks. Once explicitly stated, a court can consider in what sense norms like these make sense. Left covered by the blanket of "equity", however, they do not emerge into the daylight for consideration.[72]

2. The Purity of Customary Law

In the footprints of von Savigny and the historical school of jurisprudence, some perceive customary law as the expression of the African *Volksgeist,* or common conciousness.[73] In that view, that rule of customary law seems the best that has the longest provenance, or which best fits into the logical structure of customary law.

Customary law, like all law, however, grew out of a particular social situation. It serves the needs of particular groups in historic time and historic place. In general, it arose in response to social problems posed by a society with a relatively low level of specialisation and exchange, with relatively little communication between groups or with the great world

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71. See e.g. *infra* text accompanying n. 78.
72. In *Miki v. Emely and Mbgadzsawa* [1928-1962] S.R.N. 591, the court held that the determination of the amount of *lobolo* that a father-in-law had to return on a divorce rested on a number of different factors. "In all it appears that by taking all these factors into consideration it is really a matter of equity, in other words, what the presiding officer, with few exceptions, considers equitable according to the facts presented to him in each particular case" (p.592). Self-evidently, that permits each case to take as its measure the length of the presiding officer's foot.
73. See e.g. Allott, "The Future of African Law", in *African Law: Adaptation and Development* (Kuper and Kuper (Eds.), 1965), p.216.

outside, based primarily on kin relationships.[74] The great phrase "from status to contract" suggests how the law of those societies changes under conditions of capitalism; a further transition, from contract to plan, seems at present to be under way.[75] To hold that the best law is the oldest law, or that law which best harmonises with customary law as a whole, condemns those subject to customary law to social organisation appropriate to a far from modern society. For example, customary law in some respects treated woman as property. That may have made sense in an agricultural society based on hoe agriculture. Does it make sense in independent Zimbabwe? To say that in new Zimbabwe women ought to have same status that they had in old Rhodesia (or even before) denies the potential for beneficient change.

3. The Public Interest

A third possible criterion for choice between alternative permissible rules (or major premises) exists: to choose that rule whose consequences for society seems most likely to advance the public interest. As a basic rule of recognition that conforms to the notion that the rule that a judge selects as the major premise for a lawsuit, so far as the doctrine of precedent allows, will affect future cases. The rule a judgement anounces becomes one element in an individual's arena of choice. To that extent, it may change repetitive patterns of behaviour. Society by definition consists of the repetitive patterns of behaviour of the individuals who live in it. The choice of a rule in a trouble case, to the extent that it changes behaviour, changes society. A judge must regard the consequences of his choice on social behaviour. Therefore:

> 6. In choosing between alternative permissible rules of law to control a lawsuit, a court should choose that law whose consequences will best advance the public interest.

Self-evidently, that hardly says very much (at least it frees us from the unseen hands of natural law and of historical jurisprudence). The realist perspective explicitly holds that society embodies conflict, not consensus. In making choices as that model requires, *whose* notion of the public interest ought a judge to adopt as a guide?

I will not attempt here to answer that question in detail. I do assert that "one man, one vote" implies that a judge should have in mind the interests of the masses against the classes, the many against the few. He should choose rules that forward the emancipation of women, advance co-operatives and other forms of social ownership, tend to the elimination of racism, promote the unity of Zimbabwe's people, reduce arbitrary and discretionary power, enhance democracy and undercut ascriptive place and privilege.

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74. Seidman, *State Law and Development* (1978), Chap. 11.

75. Seidman, "Law and Development in Anglophonic, Sub-Sahara Africa" [1966] *Wis. L. Rev.* 366.

During the long period in which white males decided about the content of Zimbabwean customary law, one, Judge Pittman, during the late 1960s and early 1970s exceptionally adopted a realist, populist perspective. In *Mombeshora v. Chirume,*[76] for example, in Salisbury, the defendant's 17-year-old son crashed a car into the plaintiff's car. In the light of *Mativenga's* case,[77] another judge might well have merely found the father liable for the delict of his son. Judge Pittman, however, held otherwise. First, he carefully examined Dr Holleman's text (on the basis of which the earlier court had found against the father), reading it not as a code of law but as an anthropological text. He pointed out that "Dr Holleman's researches were conducted mainly in the Wedza district, and it did not include modern urban communities, where the idea of a father controlling the wealth of the entire family, which was the basis of the old customary law, is no longer as prevalent as it used to be".[78] He went on to say:

> The changes in the economic relationship of a family interest which have been brought about by Africans entering a cash economy and earning money in urban employment have to be recognised by this court, so that it will not grow out of touch with reality.[79]

He went on to devise a rule exempting the father from liability for an emancipated son and creating a flexible definition of "emancipated".

One other example will suffice. In *Masembura's* case,[80] as we have seen, Judge Pittman reversed 34 years of case law during which the appellate courts had imposed a requirement of corroboration and a very high standard of proof in seduction and adultery cases. Judge Pittman first found that no tribe in Zimbabwe "includes recognition of a need for corroboration in seduction cases amongst its judicial practices[81] He quoted Hoffman[82] to the effect that even in South Africa the rule had doubtful validity and unnecessary rigidity. Judge Pittman concluded:

> It is out of harmony with the modern approach to cautionary rules of evidence. Because of its rigidity, it is illogical and it may cause as much as it is intended to prevent. Furthermore, we believe that its existence in our system of customary law is a source of discontent to the people whom that system serves. Finally the caution which should always be displayed in departing from established law and which is embodied in the maxim *stare decisis,* is of less than usual importance here,

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76. [1971] AAC 30.
77. *Supra* n. 38.
78. [1971] AAC 30, at p. 33.
79. *Ibid.*
80. *Supra* n. 61.
81. [1972] AAC 28, at pp. 29-30.
82. Hoffman, *South African Law of Evidence* (2nd edn., 1970), pp. 415-416.

> because no vested rights have grown up under the established law.[83]

Judgements of that sort expose the judge's reasoning to the public view. That makes argument by the parties meaningful. It furthers both accountability and participation.

VII. CONCLUSION

THIS paper puts forward some proposed rules of recognition for customary law trouble cases. In those cases, courts must always select between alternative major premises. In the positivist perspective, that choice consists of the search for "true" law, the single rule of customary law that animates substantially all the members of the community. In the realist perspective, in genuine trouble cases no such consensus exists. Society's dominant characteristic consists not of consensus but of conflict. A court should direct its attention not to the search for non-existent "true law", but for the more just rule. If the positivist perspective holds, then the rules of recognition ought to serve the task of providing what rule customary law constitutes the social consensus. In fact, the very sources named by the statutes deny that perspective. That those sources include reported cases and textbooks alone demonstrates that they do not aim at finding a single rule of true law. Instead, the statutory sources only make sense as evidencing alternative permissible rules. Their true office lies in ensuring that a judge does not invent a rule of customary law out of whole cloth, thus to depart from his proper role.

Having determined that he cannot avoid choosing between alternative permissible rules of customary law, how ought a judge to make that choice? Almost self-evidently, the most sensible criterion for that choice lies in examining the consequences of the rule for society, and choosing that rule that will in future applications favour the mass of the population.

The realist, populist perspective, however, does not arise from the individual judge's consciousness. As we have shown, the Customary Law and Primary Courts Act 1981 embodies a change in perspective from one of control over the courts by the governing elite to a sharing of power between the judiciary and the litigants. With respect to the content of customary law, the former elite manipulated the rules of recognition to ensure their control over the customary law's content. I have argued here that the new Act requires accountablility by judges for their choice of law. With accountability comes the potential for participation in choice of law decisions by those subject to the law — and participation constitutes the new Act's principal policy choice. In this as in other aspects, the new Act takes first steps towards a fully democratic court system.

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83. [1972] AAC 28, at p. 32.